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3 Antieu, *Municipal Corporation Law* § 29.06 (1974) 6

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-900

MINNESOTA GAS COMPANY, a Delaware corporation,
Petitioner,

vs.

PUBLIC SERVICE COMMISSION, Department of Public Service, State of Minnesota,

and

CITY OF MINNEAPOLIS, State of Minnesota,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT PUBLIC SERVICE COMMISSION IN OPPOSITION

This brief is submitted by the Minnesota Public Service Commission in opposition to the Petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (A-1 - A-8 of Petition) is reported at 523 F.2d 581. The opinion of the District Court (A-9 - A-20 of Petition) is reported at 394 F. Supp. 327.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTION PRESENTED

Whether the State's exercise of its police power to regulate public utility rates has been foreclosed by a proprietary contract between the City of Minneapolis (which had no power to regulate utility rates) and petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions set forth in the Petition at page 3, Minn. Stat. § 300.04 (1974) is also relevant here. That statute provides in relevant part:

> The state shall at all times have the right to supervise and regulate the business methods and management of any such [public utility] corporation and from time to time to fix the compensation which it may charge or receive for its services. . . .

STATEMENT

Respondent accepts the basic statement of the case set forth in the Petition at pages 3-5. We point out, however, that petitioner's repeated assertions that the State "expressly authorized" the City of Minneapolis to enter into the 1970 Franchise Agreement are misleading in the context of this case. The City's authority to enter into such contracts is established in its 1920 home rule charter. That charter alone is the "express authorization" of which petitioner speaks. (*See*, 394 F. Supp. at 331-332; Petition at A-15 - A-18.) Moreover, and most critically, that charter expressly limits the City's power to that of *contract;* only the State possesses the power *to regulate* utility rates.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS IS PLAINLY CORRECT

Petitioner's primary argument to this Court, as to each of the courts below, is that the 1970 Franchise Agreement between it and the City of Minneapolis has been unconstitutionally impaired by the Minnesota Public Utilities Act.[1] The Act provides that reasonable utility rates established by respondent in accord with its provisions are to supersede rates set forth in existing utility franchise contracts. Minn. Stat. § 216B.36 (1974). Petitioner apparently asserts as well that the action of the Minnesota Legislature in vesting respondent with the authority to establish reasonable utility rates was not a proper exercise of the State's police power. Plainly, the

[1] Minn. Stat. ch. 216B (1974).

questions involved in this action were correctly decided by the Court of Appeals and the District Court and there is no reason warranting their further examination by this Court.

1. Regulation of Public Utility Rates Is a Proper Exercise of the Police Power.

It is firmly settled that the rates charged by public uilities are in themselves of sufficient public concern to justify rate regulation by a State in the exercise of its police power. *Block v. Hirsh*, 256 U.S. 135 (1921); *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U.S. 372 (1919); *Munn v. Illinois*, 94 U.S. 113 (1876); *Western States Utilities Co. v. City of Waseca*, 242 Minn. 302, 65 N.W.2d 255 (1954). Here, the challenged statute was enacted to further a legitimate public purpose (utility rate regulation) and the means chosen to further that end (the establishment by respondent of reasonable rates after full hearings)[2] are proper. Petitioner's arguments to the contrary are without merit and Minn. Stat. § 216B.36 (1974) clearly represents a legitimate exercise of the State's police power.

2. The 1970 Franchise Agreement Has Not Been Unconstitutionally Impaired.

Petitioner's argument that the 1970 Franchise Agreement between it and the City of Minneapolis is "inviolable"—that is, beyond the operation of the State's police power—is unfounded. The long-standing principles of law which led both the Court of Appeals and the District Court to reject that contention were properly applied in the case at hand.

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[2] *See, e.g.*, Minn. Stat. §§ 216B.11, 216B.16 (1974).

As noted above, State regulation of utility rates in the manner provided in the Minnesota Public Utilities Act is a legitimate exercise of the police power. While a State may authorize the suspension of that power for a reasonable length of time, the authority for a municipality or other entity to enter such an "inviolable" contract must be clearly expressed before it will be found to exist. *Home Tel. & Tel. Co. v. City of Los Angeles,* 211 U.S. 265 (1908); *Western States Utilities Co. v. City of Waseca,* 242 Minn. 302, 65 N.W.2d 255 (1954). There is, as was recognized by both the Court of Appeals (523 F.2d at 584; Petition at A-4 - A-6) and the District Court (394 F. Supp. at 330-332; Petition at A-14 - A-19) a substantial difference between the power to *regulate* rates and the authority to enter into contracts wherein rates are established by the parties to the contract.[3] In the present case, the City of Minneapolis possessed only the authority to contract in its proprietary capacity for utility rates; there was not even a delegation of the State's inherent police authority *to regulate* rates, much less an authorization for the City to suspend that power. This fact is abundantly clear in view of the fact that the State has expressly reserved to itself the authority ". . . to fix the compensation which [a public utility] may charge or receive for its services." Minn. Stat. § 300.04 (1974).[4]

The 1970 Franchise Agreement is not an "inviolable contract." It is no different in legal effect than a contract between private individuals. *Reed v. City of Anoka,* 85 Minn.

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[3] *See, also,* Seymour v. Texas Electric Service Co., 66 F.2d 814, 817 (5th Cir.), *cert. denied* 290 U.S. 685 (1933).

[4] The effective date of that statute antedates the Minneapolis home rule charter (1920) and was, of course, also in effect when the 1970 Franchise Agreement was executed. (*See* 523 F.2d at 584; Petition at A-5.)

294, 88 N.W. 981 (1902).[5] Thus, the 1970 Franchise Agreement, like all other contracts which touch upon the public interest, was properly subject to future exercise of the State's police power. *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U.S. 372 (1919). *See also: Munn v. Illinois*, 94 U.S. 113, 133 (1876); *Western States Utilities Co. v. City of Waseca*, 242 Minn. 302, 65 N.W.2d 255 (1954). The fact that the 1970 Franchise antedated the enactment of Minn. Stat. § 216B.36 (1974) does not, therefore, affect the validity of that statute under either the contract or due process clauses of the Federal Constitution. *City of El Paso v. Simmons*, 379 U.S. 497 (1965); *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109 (1937); *Union Dry Goods v. Georgia Public Service Corp., supra.*

In sum, the 1970 Franchise Agreement between petitioner and the City of Minneapolis did not bind the State, which was not a party thereto; nor did it affect in any way the authority of the State, in the exercise of its regulatory police power, to establish reasonable utility rates superseding those established by the 1970 contract. The principles supporting the decision of the Court of Appeals are long established and have been

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[5] *See, also,* C. Rhyne, *Municipal Law* § 10-2 (1957). As noted by another commentator:

> A municipality acting on its proprietary side as a business corporation, if the state does not interpose, may contract as to rates which will bind it and a public service company . . . .

12 McQuillin, *Municipal Corporations* § 34.148 at p. 312 (3d ed. 1970). *Accord:* 3 Antieu, Municipal Corporation Law, § 29.06 (1974).

Thus, petitioner's assertion that the City of Minneapolis acted as an "agent" of the State when it executed the 1970 Franchise Agreement (Petition at 12) is erroneous as well as being irrelevant to the issues here.

uniformly applied for many years.[6] There is no conflict between the various Courts of Appeal and the applicable law is well settled. No reason whatever justifies review of the decision below by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[6] Petitioner's reliance upon this Court's decision in St. Cloud Public Service Co. v. City of St. Cloud, 265 U.S. 352 (1924), is obviously misplaced for the reasons noted by the Court of Appeals. (523 F.2d at 583-584; Petition at A-4 - A-6.)